

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JERMONTA R CUMMINGS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF  
CALIFORNIA, et al.,

Respondent.

Case No. [22-cv-02385-HSG](#)

**ORDER DENYING PETITION FOR A  
WRIT OF HABEAS CORPUS;  
DENYING CERTIFICATE OF  
APPEALABILITY**

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner Jermonta Cummings, challenging the validity of his state court conviction. Dkt. No. 1. Respondent has filed an answer to the petition. Dkt. No. 13 (“Answer”). Petitioner has not filed a traverse and the deadline to do so has since passed. For the reasons set forth below, the Court DENIES the petition for a writ of habeas corpus and DENIES a certificate of appealability.

**I. PROCEDURAL HISTORY**

On June 14, 2019, an Alameda County jury found Petitioner guilty of mayhem and assault with a deadly weapon, Cal. Penal Code § 245(a)(1), and found true enhancements for great bodily injury and personal use of a weapon, Cal. Penal Code §§ 12022(b)(1), 12022.7(a). The jury found Petitioner not guilty of attempted murder or attempted voluntary manslaughter. Answer, Ex. 1 (“CT”) at 498-500, 510-14. In a bifurcated proceeding, the jury hung on the prior conviction allegation for residential burglary, and the court then declared a mistrial. CT 515-518. On retrial with a new jury, the prior conviction allegation was found true. CT 550-52, 595. Petitioner was sentenced to 19 years in state prison. CT 662-63, 668-69, 683-88.

Petitioner appealed, arguing that the retrial of the prior conviction allegation violated his

rights to due process and a fair trial because the retrial of the prior conviction was barred by Cal. Penal Code §§ 1025 and 1158 and the trial court therefore lacked jurisdiction and authority to order a retrial. Answer, Ex. 3. On December 23, 2021, the California Court of Appeal affirmed the judgment of conviction. *People v. Cummings*, C No. A159610, 2021 WL 6068977 (Cal. Ct. App. Dec. 23, 2021). On March 9, 2022, the California Supreme Court denied Petitioner's petition for review. Answer, Exs. 7, 8.

On or about April 15, 2022, Petitioner filed the instant federal petition for a writ of habeas corpus. Dkt. No. 1. On May 3, 2022, the Court found that the petition stated the following cognizable claim for federal habeas relief: Petitioner's due process rights and right to a fair trial were violated when, in a bifurcated proceeding, the jury was unable to reach a determination as to the prior strike conviction allegation, a mistrial was declared, and then the trial court over Petitioner's objection empaneled a new jury that found the alleged prior strike conviction to be true. Dkt. No. 6. More specifically, Petitioner argues that due process requires that his guilt with respect to the prior conviction allegation be decided by the same jury that decided his guilt of the commitment offense. Dkt. Nos. 1, 6. The Court ordered Respondent to show cause why federal habeas relief should not be granted on this claim. Dkt. No. 6.

## II. FACTUAL BACKGROUND

The following background is taken from the California Court of Appeal's opinion:<sup>12</sup>

In July 2018, the Alameda County District Attorney filed an information alleging one count of attempted murder (§§ 664, 187, subd. (a)), one count of felony aggravated mayhem (§ 205), and one count of felony assault with a deadly weapon (§ 245, subd. (a)(1)). The information also included special allegations of personal infliction of great bodily injury (§ 12022.7, subd. (a)) and use of a deadly weapon (§ 12022, subd. (b)(1)) as to all three counts, and that defendant had suffered one prior strike conviction (§ 1170.12, subd. (c)(1)).

The jury found defendant not guilty of count 1 (attempted murder), guilty of count 3 (assault with a deadly weapon) and did not reach a verdict as to count 2 (aggravated

<sup>1</sup> The California Court of Appeal only recited the facts relevant to the issue on appeal. Because the commitment offense is not at issue, the factual background is limited to the decision to order a retrial on the prior conviction allegation.

<sup>2</sup> The Court has independently reviewed the record as required by AEDPA. *Nasby v. Daniel*, 853 F.3d 1049, 1052–54 (9th Cir. 2017). Based on the Court's independent review, the Court finds that it can reasonably conclude that the state court's summary of the prosecution case and the defense case is supported by the record, unless otherwise indicated in this order.

mayhem).

After the court granted the prosecution's motion to amend count 2 to simple mayhem (§ 203), the jury found defendant guilty as to that count and also found true the bodily injury and deadly weapon special allegations as to counts 2 and 3. However, in bifurcated proceedings, the jury was unable to reach a determination as to the prior strike allegation, and the court declared a mistrial pursuant to section 1140. [FN 3]

FN 3: Section 1140 provides, "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

About two weeks later, the court ordered a new panel of prospective jurors, and defendant subsequently filed a motion objecting to retrial of the prior strike conviction pursuant to sections 1025, subdivision (b) and 1158. Following a hearing, the court denied the motion, and the newly impaneled jury proceeded to find true the alleged prior conviction.

The court sentenced defendant to an aggregate term of 19 years, consisting of an eight-year term for the mayhem count, doubled to 16 years because of the prior, along with a three-year consecutive term for the great bodily injury special allegation. Count 2 and the remaining special allegations for counts 2 and 3 were stayed.

*Cummings*, 2021 WL 6068977, at \*1.

### III. DISCUSSION

#### A. Standard of Review

A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state courts' adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Additionally, habeas relief is warranted only if the

1 constitutional error at issue “had substantial and injurious effect or influence in determining the  
2 jury’s verdict.” *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

3 A state court decision is “contrary to” clearly established Supreme Court precedent if it  
4 “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it  
5 “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]  
6 Court and nevertheless arrives at a result different from [its] precedent.” *Williams*, 529 U.S. at  
7 405–06. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if  
8 the state court identifies the correct governing legal principle from [the Supreme] Court’s  
9 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.  
10 “[A] federal habeas court may not issue the writ simply because that court concludes in its  
11 independent judgment that the relevant state-court decision applied clearly established federal law  
12 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

13 Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court’s  
14 jurisprudence. “[C]learly established Federal law, as determined by the Supreme Court of the  
15 United States” refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions  
16 as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. “A federal court  
17 may not overrule a state court for simply holding a view different from its own, when the  
18 precedent from [the Supreme Court] is, at best, ambiguous.” *Mitchell v. Esparza*, 540 U.S. 12, 17  
19 (2003).

20 The state court decision to which § 2254(d) applies is the “last reasoned decision” of the  
21 state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991);<sup>3</sup> *Barker v. Fleming*, 423 F.3d  
22 1085, 1091–92 (9th Cir. 2005). In considering Petitioner’s claim, the Court reviews the California  
23 Court of Appeal’s December 23, 2021 decision because it was the last reasoned state court

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25 <sup>3</sup> Although *Ylst* was a procedural default case, the “look through” rule announced there has been  
26 extended beyond the context of procedural default. *Barker v. Fleming*, 423 F.3d 1085, 1091 n.3  
27 (9th Cir. 2005). The look through rule continues as the Ninth Circuit held that “it is a common  
28 practice of the federal courts to examine the last reasoned state decision to determine whether a  
state-court decision is ‘contrary to’ or ‘an unreasonable application of’ clearly established federal  
law” and “it [is] unlikely that the Supreme Court intended to disrupt this practice without making  
its intention clear.” *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir.), *amended*, 733 F.3d 794  
(9th Cir. 2013).

1 decision to consider Petitioner's claim.

2 **B. Petitioner's Claim**

3 Petitioner argues that the trial court violated Cal. Penal Code §§ 1025(b), 1158 when it  
4 ordered and held a retrial on the prior conviction allegation, thereby denying him the right to due  
5 process and a fair trial. He argues that Cal. Penal Code sections 1025(b) and 1158 require that the  
6 prior conviction be tried by the same jury that considered the commitment offense. *See generally*  
7 Dkt. No. 1. In support of his claim, Plaintiff cites to the following state law cases: *Cty. of Lake v.*  
8 *Palla*, 94 Cal. App. 4th 418, 425 (Cal. Ct. App. 2001); *People v. Ysabel*, 28 Cal. App. 2d 259 (Cal.  
9 Ct. App. 1938); and *People v. Kingsburg*, 70 Cal. App. 2d 128, 131 (Cal. Ct. App. 1945).  
10 Petitioner does not cite to any federal statute, federal constitutional provision, or federal caselaw in  
11 support of his argument.

12 The state appellate court denied the claim in a lengthy and reasoned opinion, finding that  
13 the plain language of Cal. Penal Code sections 1025(b) and 1158 does not foreclose a retrial,  
14 following a declared mistrial, in a bifurcated trial on a prior conviction allegation. In support of its  
15 conclusion, the state court analyzed the following state court cases: *People v. Epps*, 25 Cal.4th 19,  
16 23 (Cal. 2001); *People v. Ysabel*, 28 Cal.App.2d 259 (Cal. Ct. App. 1938); *People v. Morton*, 41  
17 Cal.2d 536, 542 (Cal. Ct. App. 1953); *People v. Saunders*, 5 Cal.4th 580 (Cal. 1993); *People v.*  
18 *Grimes*, 1 Cal.5th 698, 737-38 (Cal. 2016); *People v. Tindall*, 24 Cal.4th 767, 773 (Cal. 2000);  
19 *People v. Collins*, 117 Cal.App.2d 175, 183 (Cal. Ct. App. 1953); *People v. Hoerler*, 208  
20 Cal.App.2d 402, 404 (Cal. Ct. App. 1962); *People v. Hickok*, 230 Cal.App.2d 57 (Cal. Ct. App.  
21 1964); *People v. Wojahn*, 150 Cal.App.3d 1024 (Cal. Ct. App. 1984); *People v. Barragan*, 32  
22 Cal.4th 236 (Cal. 2004); *People v. Moore*, 8 Cal.App.4th 411 (Cal. Ct. App. 1992); *People v.*  
23 *Boggs*, 166 Cal.App.3d 851, 856 (Cal. Ct. App. 1985); *People v. Weathington*, 231 Cal.App.3d  
24 69, 91 (Cal. Ct. App. 1991); *People v. Tipton*, 160 Cal.App.3d 853, 857 (Cal. Ct. App. 1984).  
25 *Cummings*, 2021 WL 6068977, at \*2-\*8. The state court did not consider federal law in reaching  
26 its conclusion. *See id.*

27 Respondent argues Petitioner is not entitled to federal habeas relief on this claim for the  
28 following reasons. First, Respondent argues that whether the state court properly interpreted the

California Penal Code is a question of state law, and therefore not reviewable by this Court. Second, Respondent argues that there is no clearly established Federal law, and due process does not require, that a prior conviction allegation must be tried by the same jury that decided the charges for the commitment offense. Petitioner has not submitted a traverse or otherwise responded to the Answer.

The Court agrees with Respondent. The state court's determination that the retrial on the prior conviction following a mistrial did not violate state law does not state a claim for federal habeas relief. This determination involves an interpretation of state, not federal, law.

Nor may Petitioner "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). A violation of a state law might implicate federal due process concerns, but only if the state statute creates a protected "liberty interest." See *Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995 ("*Bonin I*"). A state law creates a "liberty interest" protected by the Due Process Clause if the law: (1) contains "substantive predicates" governing official decision making; (2) contains "explicitly mandatory language" specifying the outcome that must be reached if the substantive predicates are met; and (3) protects "some substantive right protected by the Constitution." *Id.* at 842; see, e.g., *Bonin v. Calderon*, 77 F.3d 1155, 1161-62 (9th Cir. 1996) ("*Bonin II*") (even assuming violation of state law in setting execution date, no federal habeas claim because there was no deprivation of federal substantive right); *Bonin I*, 59 F.3d at 842 (California statute which gives defendant in capital case right to have two defense attorneys argue on his behalf does not create protected liberty interest cognizable in habeas because it contains neither "substantive predicates" nor "explicitly mandatory language," and there is no federal constitutional right to have two attorneys make closing arguments). Here, Petitioner has not shown that Cal. Penal Code section 1025(b) and 1158 protect a substantive right guaranteed by the U.S. Constitution.<sup>4</sup> In fact, the Supreme Court

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<sup>4</sup> To the extent that the repeated trials could raise a double jeopardy concern, there is no such concern when the alleged repeated trials concerned only a sentencing determination arising out of the existence of prior convictions. See *Monge v. California*, 524 U.S. 721, 727-28, 734 (1998) (protections of Double Jeopardy Clause do not extend to noncapital sentencing because sentencing determinations in noncapital cases do not place defendant in jeopardy for an "offense").

has held that the constitutional right to a jury trial does not extend to a determination of whether a defendant has suffered a prior conviction. *See Cunningham v. Calif.*, 549 U.S. 270, 274-75 (2007) (“[T]he Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.”); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

Petitioner is not entitled to relief on his claim because he does not allege a violation of federal law. Federal habeas relief does not lie for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68, (1991); *Hendricks v. Zenon*, 993 F. 2d 664, 674 (9th Cir. 1993) (claim exclusively concerned with state law not cognizable in federal habeas). This Court is bound by the state court’s interpretation of Cal. Penal Code §§ 1025(b), 1158. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“A state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.”); *see also Mendez v. Small*, 298 F. 3d 1154, 1158 (9th Cir. 2002) (“[a] state court has the last word on interpretation of state law”) (citations omitted).

### **C. Certificate of Appealability**

The federal rules governing habeas cases brought by state prisoners require a district court that issues an order denying a habeas petition to either grant or deny therein a certificate of appealability. *See Rules Governing § 2254 Case*, Rule 11(a).

A judge shall grant a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the certificate must indicate which issues satisfy this standard. *Id.* § 2253(c)(3). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).



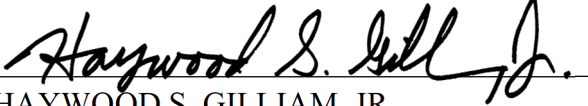
1 Here, Petitioner has not made such a showing, and, accordingly, a certificate of  
2 appealability will be denied.

3 **IV. CONCLUSION**

4 For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a  
5 certificate of appealability is DENIED. The Clerk shall enter judgment in favor of Respondent  
6 and close the case.

7 **IT IS SO ORDERED.**

8 Dated: June 30, 2023

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10 HAYWOOD S. GILLIAM, JR.  
11 United States District Judge  
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